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No. 86-1183

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH LEON FOWLER, JR. . . . . PETITIONER

versus

CITY OF LOUISVILLE, KY., et. al. . RESPONDENTS

PETITIONER'S REPLY BRIEF

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*Citation at end of first sentence of first paragraph on page 6 inadvertently omitted.

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VERBATIM CITATIONS OF STATUTES NOT PREVIOUSLY CITED IN THIS CASE

Kentucky Revised Statutes 413.120(1):

> The following actions shall be commenced within five (5) years after the cause of action accrued: . . . (2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

Kentucky Revised Statutes 413.140(1)(d):

> The following actions shall be commenced within one (1) year after the cause of action accrued:. . . (d) An action for libel or slander.

ARGUMENT

I

Retroactivity of Limitations?

The Respondents first raised the issue of the possibile applicability of a statute of limitations in their motion for summary judgment (R. 23, Motion for Summary Judgment). In that motion they cited one case, Wilson v. Garcia, ___U.S.___, 105 S.Ct. 1938, 85 L.Ed.2d (1985) and one statute, Kentucky Revised Statutes (KRS) 413.140(1)(a), the Kentucky one-year personal injury limitations statute, in support of their argument that Petitioner's claim was barred by a statute of limitation (R. 23, Motion for Summary Judgment, Pp. 2-3). In his response to this motion, of course, the Petitioner made the arguments contained in his Petition before this Court, albeit in greater detail (R. 27, Plaintiff's Response to Motion for Summary Judgment).

In their brief for the United States Court of Appeals for the Sixth Circuit, the Respondents for the first time argued specifically for the retroactive application

of this Court's "bright line" limitations rule in cases filed pursuant to 42 U.S.C. section 1983, as enunciated in Wilson v. Garcia, supra. (Appellee's Brief for the Sixth Circuit, Pp. 25-26).

The Respondents' first citation of the case of Hines v. Board of Education of Covington, Ky., 492 F.Supp. 469 (E.D., Ky., 1980), aff'd, 667 F.2d 544 (6th Circ., 1982) was in their brief filed with this Court. Apparently they respected the ability of the Courts below to understand the clear inapplicability of the holding of the Hines case to the case at bar. Furthermore, neither of the Courts below relied upon Hines in any manner whatsoever.

Hines, supra, stands squarely for the proposition that a public employee without any property interest in his employment who is denied a hearing upon his termination from that employment can articulate a Constitutional claim pursuant to 42 U.S.C. section 1983 only for an alleged violation of his liberty interest in his reputation. Under these circumstances, reasoned the Court in Hines, the applicable state statute

of limitations is that for defamation actions, which in Kentucky is KRS 413.140(1)(d), It provides a one year period during which to bring, "An action for libel or slander," Hines, supra, 667 F.2d 546-565.

Hines did not overturn the rule set forth in Garner v. Stephens, 460 F.2d 1114 (6th Circ., 1979). In it, the Court noted that public employment discharge cases brought pursuant to 42 U.S.C. section 1983 where a property interest is at stake may either be characterized as per KRS 413.120(1) as, "An action upon a contract not in writing, express or implied," or as per KRS 413.120(2) as, "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability," Hines, supra, at 471-472. Both of these limitations periods are five (5) years and either could arguably apply to the case at bar under the characterization process that the Court correctly undertook in Hines and that represented the state of the law prior to this Court's Wilson v. Garcia opinion.

By their inapposite citation of Hines,

the Respondents have tacitly admitted the bankruptcy of the arguments in favor of the retroactive application of this Court's Wilson v. Garcia holding, which arguments simply cannot withstand the light of analysis as per Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

This Court should grant the Petition in order to lay this issue to rest in a just manner.

II

Res Judicata?

The Respondents contend that the Petitioner should not prevail upon the res judicata issue because he, ". . . was in fact under an obligation to make or tender all issues necessary to support his cause of action for wrongful discharge," before the Louisville Civil Service Board and the Kentucky Courts (Respondent's Brief, P. 11).

Petitioner took considerable pains below to show that under Kentucky law any one or more grounds of attack upon his discharge would be sufficient to state a "cause of action" under KRS 90.190, and that in fact he articulated two

grounds of attack upon his discharge before the Louisville Civil Service Board and the courts of Kentucky (Appellant's Brief for the Sixth Circuit, Pp. 23-25). These grounds, namely his denial of guilt of any offense denominated by any rule of the Louisville Police Department and his assertion that his discharge violated his right to the equal protection of the laws, were sufficient together or separately to "support his cause of action" as per Bryan Brothers Packing Company v. Garrard, Ky., 386 S.W.2d 468, 471 (1965). Any issues the the Petitioner did not raise before the Kentucky tribunals were obviously not necessary to support his "cause of action" before them and he was therefore, ". . . under no obligation to tender [them]," to those tribunals, Id.

The Kentucky courts apply the doctrine of res judicata as a surgeon applies a scalpel: with great caution. As the Kentucky Supreme Court said in Floyd County Board of Education v. Layne, Ky., 474 S.W.2d 379, 389-390 (1977) of res judicata:

> . . . it is to be applied in particular situations as fairness and justice require, and. . . is not to be applied so rigidly as to defeat the ends of justice or to work an injustice.

Certain elements must exist before the courts of Kentucky will apply the affirmative defense of res judicata. One is that issues sought to be precluded in a later action must have been, ". . . actually litigated and determined in the prior action," Whittenberg Engineering and Construction Co. v. Liberty Mutual Insurance Co., Ky., 290 S.W.2d 877, 883 (1965). This element is simply not present in the case at bar. Another element necessary to support the plea of res judicata is identity of cause of action between the earlier and later proceedings in which the parties are involved, Blevins v. Johnson, Ky., 344 S.W.2d 375, 377 (1961). In a very recent opinion, the United States District Court for Eastern Kentucky held that a statutory right of appeal by state employees to the Kentucky Personnel Board is not identical to a cause of action brought pursuant to 42 U.S.C. section 1983, even if both actions involve an alleged "wrongful discharge," and refused to apply the

doctrine of res judicata as a bar to the plaintiff's section 1983 claim because of his having pursued an appeal of his discharge to the Kentucky Personnel Board, Barnes v. McDowell, 647 F.Supp., 1307, 1309 (E.D., Ky. 1983). Obviously a statutory right of appeal to the Louisville Civil Service Board is no more identical to an action brought pursuant to 42 U.S.C. section 1983 than a statutory right of appeal to the Kentucky Personnel Board.

Ultimately, the Respondents retreat to sophistry upon this issue as upon the limitations issue, by an ad hominem argument derived from the District Court's well-known and good reputation as a former Kentucky Circuit Judge and the obvious fact that res judicata is a matter of state substantive law. Neither of these facts, of course, mean that the District Judge was correct in the case at bar. Furthermore, if he was not right, the Petitioner's Constitutional rights have been affected by his action as well as those of the Respondents. Withal, the Respondents have amply justified the alarums raised by the Petitioner at page 20 of his Petition for Certiorari, which

petition should be granted for the reasons stated in it.

III

Petitioner's Believability?

The Respondents assert that the state "trial" judge involved in Petitioner's statutory appeal to the Kentucky Courts disbelieved Petitioner's testimony as to his reasons for purchasing materials from Harold Graham and his disposition of those materials (Respondents' Brief, Pp. 12-13). Of course, the District Judge reacted to Petitioner's testimony in a similar manner.

The Respondent has not challenged Petitioner's assertion that the Louisville Civil Service Board actually believed Petitioner's testimony upon these issues (Petition, P. 8). So far, therefore, the score upon the believability of his testimony is 5-2, and the ayes have it.

Obviously, the Petitioner is entitled to have a jury of his peers decide how credible his testimony is. This is especially true of his claim that he was denied a fair hearing before the Louisville Civil Service Board, which

claim has never been addressed in any manner whatsoever by any of the Courts below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Reply Brief in support of the Petition for Certiorari upon the following attorneys for the Respondents: Paul Guagliardo, Room 200, City Hall, Louisville, Ky. 40202, and Mark W. Dobbins, 600 West Main Street, Louisville, Ky., 40202, by amiling or delivering the same to their respective offices upon this the 19th day of February, 1987.

PHILIP C. KIMBALL
Attorney for Petitioner

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